Ng Hoe Keong & Ors v OAG Engineering Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 08(i)-67–03 OF 2021 (W)
ZALEHA YUSOF, HASNAH MOHAMMED HASHIM AND RHODZARIAH BUJANG FCJJ
18 APRIL 2022

Civil Procedure — Appeal — Leave to appeal — Single judge of Federal Court ('FC') denied applicant leave to appeal to FC against decision of Court of Appeal — Applicant filed fresh application under s 97(4) of the Courts of Judicature Act 1964 ('CJA') for three-member panel of FC to 'discharge' decision of single judge and rehear the leave application — Applicant did not give any reasons why single judge's decision should be 'discharged' — Whether even though s 97(4) did not say so, applicant had to show strong, cogent and compelling reasons why decision of single judge had to be overturned — Whether applicant could not arbitrarily make a s 97(4) application simply because of dissatisfaction with single judge's decision as it would open floodgates and inundate FC with similar applications — Whether purpose of CJA was amended to insert sub-ss (3) and (4) into s 97 was to expedite hearing of leave applications — Whether that purpose would be defeated if three-judge panel overturned single judge's decision and granted leave as a matter of course — Whether a s 97(4) application amounted to a review application — Whether the usual rules relating to an application to FC to review its own decision would therefore apply

The appellants' application under s 97(3) of the Courts of Judicature Act 1964 ('the CJA') for leave to appeal to the Federal Court against a Court of Appeal decision had been dismissed after hearing by a single judge of the Federal Court. In the instant notice of motion, pursuant to s 97(4) of the CJA, the appellants sought to 'discharge' the single judge's order. The respondents raised a preliminary objection ('PO') that the motion should be dismissed in limine as, inter alia, the appellants had not shown where the single judge had gone wrong in her decision. The respondents submitted that the order of a single judge refusing leave to appeal should not be overturned unless there were strong and compelling reasons to do so. The appellants, however, took the position that they were entitled as a matter of course to file the motion under s 97(4) for it to be heard before a three-judge panel as they were not satisfied with the decision of the single judge. The appellants said there was nothing in s 97 that imposed a burden on them to show in what way the single judge's decision was wrong.

Held, allowing the PO and dismissing the notice of motion:

(1) There was nothing in the appellants' affidavit-in-support to show why their latest application was filed other than the fact that the leave application that was filed earlier was dismissed by the single judge that heard it. No reasons were given as to what was wrong with the decision of the single judge. The appellants treated the application under s 97(4) as a matter of right. To the appellants, once an application for leave to appeal was dismissed by a single judge, the aggrieved party could straight away within ten days file another application for it to be heard by a panel of three judges without giving any reason and the panel had to hear and determine that application without looking at its merit. This approach was not right as it would open the floodgates and inundate the court with a host of such applications. It would defeat the very purpose for which sub-ss (3) and (4) were introduced into s 97 of the CJA by a 1998 amendment — which was to expedite the hearing of leave applications (see paras 31–32).

(2) The key point was whether the instant application required justification. Unless there were very strong, cogent and compelling reasons to do so, a single judge's order on an application for leave to appeal should not be overturned. The record of the leave application proceedings showed that the single judge had thoroughly studied and deliberated on all the issues that were before her before she dismissed the leave application. Although the appellants had the right to make the application under s 97(4) of the CJA, they failed to explain what was wrong with the single judge's decision. An application under s 97(4) could not be made arbitrarily (see paras 33, 35, 37–39 & 42).

(3) The purpose of the amendment that inserted sub-ss (3) and (4) into s 97 of the CJA was to expedite the disposal of leave applications to save judicial costs and time. To allow leave to be granted automatically upon the discharge of an order of a single judge dismissing leave to appeal would definitely delay and hamper the proper administration of justice. Therefore, for any order under s 97(3) to be reconsidered by a minimum panel of three judges, cogent reasons had to be shown by the applicants (see para 40).

(4) An application under s 97(4) of the CJA was actually a review application. The decision made by a single judge was still a decision of the Federal Court. Under no circumstances would the Federal Court review its own decision unless it was shown that it fell within the limited ground and very exceptional circumstances as explained by this court in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090 (see para 43).

[Bahasa Malaysia summary

Permohonan perayu di bawah s 97(3) Akta Mahkamah Kehakiman 1964 ('AMK') untuk kebenaran merayu kepada Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan telah ditolak selepas didengar oleh seorang hakim Mahkamah Persekutuan. Dalam notis usul semasa, menurut s 97(4) AMK, perayu-perayu memohon untuk 'melepaskan' perintah hakim tunggal tersebut. Responden membangkitkan bantahan awal ('BA') bahawa usul tersebut harus ditolak in limine kerana, antara lain, perayu tidak menunjukkan di mana hakim tunggal tersebut terkhilf dalam keputusannya. Responden berhujah bahawa perintah seorang hakim yang menolak kebenaran merayu tidak seharusnya dibatalkan melainkan terdapat alasan yang kuat dan kukuh untuk berbuat demikian. Perayu-perayu bagaimanapun mengambil pendirian bahawa mereka berhak memfailkan usul di bawah s 97(4) untuk didengar di hadapan panel tiga hakim kerana mereka tidak berpuas hati dengan keputusan hakim tunggal tersebut. Perayu-perayu berkata tidak ada apa-apa dalam s 97 yang meletakkan beban kepada mereka untuk menunjukkan bagaimana keputusan hakim tunggal tersebut salah.

Diputuskan, sebulat suara membenarkan BA dan menolak notis usul:

(1) Tiada apa-apa dalam afidavit sokongan perayu untuk menunjukkan mengapa permohonan terbaru mereka difailkan selain fakta bahawa permohonan kebenaran yang difailkan sebelum ini telah ditolak oleh hakim tunggal yang mendengarnya. Tiada alasan diberikan tentang apa yang salah dengan keputusan hakim tunggal tersebut. Perayu-perayu menganggap permohonan di bawah s 97(4) sebagai hak. Kepada perayu-perayu, sebaik sahaja permohonan kebenaran merayu ditolak oleh seorang hakim, pihak yang terkilan boleh terus memfailkan permohonan lain dalam tempoh sepuluh hari untuk didengar oleh panel tiga hakim tanpa memberi apa-apa alasan dan panel harus mendengar dan menentukan permohonan tersebut tanpa melihat meritnya. Pendekatan ini tidak betul kerana ia akan membuka pintu dan menyusahkan mahkamah dengan pelbagai permohonan sedemikian. Ia akan mengalahkan tujuan sebenarnya sub-ss (3) dan (4) telah dimasukkan ke dalam s 97 AMK melalui pindaan 1998 — iaitu untuk mempercepatkan pendengaran permohonan kebenaran (lihat perenggan 31–32).

(2) Perkara utama adalah sama ada permohonan semasa memerlukan justifikasi. Melainkan terdapat alasan yang sangat kuat, tegas dan kukuh untuk berbuat demikian, perintah hakim tunggal mengenai permohonan kebenaran merayu tidak seharusnya dibatalkan. Rekod prosiding permohonan kebenaran menunjukkan bahawa hakim tunggal tersebut telah mengkaji dengan teliti dan membincangkan semua isu yang dihadapinya sebelum beliau menolak permohonan kebenaran.

Walaupun perayu mempunyai hak untuk membuat permohonan di bawah s 97(4) AMK, mereka gagal menjelaskan apa yang salah dengan keputusan hakim tunggal tersebut. Permohonan di bawah s 97(4) tidak boleh dibuat sewenang-wenangnya (lihat perenggan 33, 35, 37–39 & 42).

(3) Tujuan pindaan yang memasukkan sub-ss (3) dan (4) ke dalam s 97 AMK adalah untuk mempercepatkan pelupusan permohonan kebenaran bagi menjimatkan kos dan masa kehakiman. Untuk membenarkan kebenaran diberikan secara automatik selepas perintah hakim tunggal menolak kebenaran merayu pasti akan melambatkan dan menghalang pentadbiran keadilan yang sepatutnya. Oleh itu, bagi mana-mana perintah di bawah s 97(3) untuk dipertimbangkan semula oleh panel minimum tiga hakim, alasan yang kukuh perlu ditunjukkan oleh pemohon (lihat perenggan 40).

(4) Permohonan di bawah s 97(4) AMK sebenarnya adalah permohonan semakan. Keputusan yang dibuat oleh seorang hakim masih merupakan keputusan Mahkamah Persekutuan. Dalam apa jua keadaan, Mahkamah Persekutuan tidak akan menyemak keputusannya sendiri melainkan jika ditunjukkan bahawa ia berada dalam keadaan terhad dan keadaan yang sangat luar biasa seperti yang dijelaskan oleh mahkamah ini dalam *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090 (lihat perenggan 43).]

Cases referred to

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1, FC (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)
Gurubachan Singh a/l Bagawan Singh and Anor v Vellasamy a/l Ponnusamy & 3 others Federal Court Civil Application No 8(i)-67–03 of 2021 (w) (unreported), FC (refd)
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 4) (1998) 155 ALR 328, FC (refd)
Iran Nabuvat, The [1990] 3 All ER 9, CA (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)

Legislation referred to

Code of Civil Procedure 1908 [IND] s 109
Constitutional Reform Act 2005 [UK] s 42(1)
Courts of Judicature Act 1964 ss 44, 74, 74(1), 80, 91, 96, 96(a), 97, 97(1), (2), (3), (4)
High Court Rules 2004 [AUS] Part 41.08.1
Judiciary Act 1907 [AUS] ss 19, 21
Rules of Court [SG] O 56 r 3, O 57 r 2A

A Senior Courts Act 1981 [UK] s 54
Supreme Court Act [CN] ss 25, 37, 40, 43
Supreme Court Act 1981 [UK] s 54(6)
Supreme Court of Judicature Act 1969 [SG] s 30(1), Sixth Schedule, para 3(C)

B

Appeal from: Civil Appeal No W-02(IM)(IPCv)-1605–10 of 2020 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Aston Paiva, Yasmeen Soh and Rossa Severinus with him) (Vazeer Akhbar Majid & Co) for the applicants.
C *Razlan Hadri Zulkifli (Wong Kah Hui, Soong Hon Ming, Jess Pang and Chai Tze Jing with him) (KH Wong & Co) for the respondents.*

Zaleha Yusof FCJ:

D

BRIEF BACKGROUND FACTS

[1] The respondents had filed a suit ('Suit 42') at the High Court against the applicants for, inter alia, breach of fiduciary duty and a permanent
E injunction. Before the statement of claim was served on the applicants, the respondents obtained an Anton Pillar order and a protective order against the appellants. Both orders were granted ex parte by the High Court.

F **[2]** The applicants' applications to set aside the said two orders and to dismiss the suit for failure to serve the statement of claim were dismissed by the High Court. However, the High Court directed the respondents to serve the applicants with a redacted statement of claim which the respondents did on 21 October 2020.

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[3] The applicants' appeal to the Court of Appeal against the said decision of the High Court was also dismissed on 25 February 2021.

[4] Aggrieved, the applicants filed a notice of motion dated 9 March 2021
H ('motion of 9 March 2021') for leave to appeal to the Federal Court pursuant to sub-s 96(a) of the Courts of Judicature Act 1964 ('Act 91'). The said motion of 9 March 2021 was heard on 22 July 2021 before a single judge of this court pursuant to sub-s 97(3) of Act 91. The single judge dismissed the said motion of 9 March 2021 after hearing the submissions of the parties.

I

[5] Now before us, the applicants filed this notice of motion in encl (47) pursuant to sub-s 97(4) to discharge the order of the single judge dated 22 July 2021.

[6] Enclosure (47) was fixed for hearing before us on 15 March 2022.

ISSUE

[7] Whether there is any burden imposed on an aggrieved party against whom the decision by a single judge was made under sub-s 97(3) of Act 91, to show justification before his application under sub-s 97(4) of the same Act can be allowed.

SUBMISSIONS OF COUNSEL

[8] Learned counsel for the respondents raised a preliminary objection that encl (47) must be dismissed in limine.

[9] Learned counsel for the respondents, En Razlan contended that an order for discharge means the applicants are relieved from obligations as contained in the order. Hence, there must be a positive order or an active obligation contained in the order sought to be discharged. In this case, he argued, the applicants' application for leave to appeal was dismissed. Upon the dismissal, there are no obligations, sanctions or limitations placed upon the applications. Therefore, he argued, the order of this court dated 22 July 2021 was not capable of being discharged.

[10] He further submitted that the said phrase 'affirm, vary and discharge' also appear in ss 44 and 80 of Act 91. As those sections deal with interim, preservation or stay order pending the hearing of a full appeal at the Court of Appeal or the Federal Court, sub-s 97(4) also must be read to limit its application for instances where there remains a pending proceeding such as an appeal before the Federal Court.

[11] Further learned counsel for the respondents submitted, the appellants had failed to show what was wrong with the decision of the learned single judge. Nothing in the affidavit of the applicants made averment that the learned single judge was wrong in her decision and the reasons for saying so.

[12] He cited the cases of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 and the case of *The Iran Nabuvat* [1990] 3 All ER 9 to support his argument that an order made by a single judge should not be overturned unless there are very strong and compelling reasons to do so.

[13] For the applicants, learned counsel Dato Seri Gopal Sri Ram submitted the general rule is, that all proceedings in the Federal Court shall be heard before a panel of three judges as provided under sub-s 74(1) of Act 91.

However, by virtue of the non-obstante clause found in sub-s 97(3) of Act 91, that provision of sub-s 74(1) is overridden. Subsection 97(3) allows a single judge to hear an application for leave to appeal to the Federal Court, notwithstanding s 74.

[14] He further referred to the Hansard when s 97 was amended and the Bill was tabled at Parliament. The Minister-in-charge had stated that any party who is not satisfied with the decision of a single judge can apply for his application to be heard before a panel of three judges. He, therefore, submitted that the purpose of the section was for an aggrieved party to come before the court, and that s 97 does not impose any burden to show the single judge is wrong. He said the full panel must hear once an application is made within ten days after the order of the single judge.

[15] Learned counsel for the applicant had cited the case of *Gurubachan Singh a/l Bagawan Singh and Anor v Vellasamy a/l Ponnusamy & 3 others* Federal Court Civil Application No 8(i)-67–03 of 2021 (w) whereby this court had allowed similar applications under sub-s 97(4) of Act 91 on 1 November 2021.

DECISION

[16] We begin by reproducing the relevant ss 74 and 97 of Act 91 to better understand the issue.

74 Composition of the Federal Court

(a) Subject as hereinafter provided, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.

(b) In the absence of the Chief Justice, the most senior number of the Court shall preside.

...
...

97 Leave to appeal

(1) An application under section 96 for leave to appeal to the Federal Court shall be made to the Federal Court within one month from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court.

(2) Where the judgement appealed against requires the appellant to pay money or perform a duty, the Federal Court shall have power, when granting leave to appeal, either to direct that the judgement shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just; and in case the Court shall direct the judgement to be carried into execution, the person in

whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of that Court for the due performance of any order as the Federal Court may make in order to give effect thereto.

(3) Notwithstanding section 74, an application for leave to appeal to the Federal Court may be heard by a Judge of the Court, and any direction or order that could be given or made by the Court on such application may be given or made by such Judge.

(4) Any direction or order given or made under subsection (3) may, upon application by the aggrieved party made within ten days after direction or order is given or made, be affirmed, carried or discharged by the Court.

[17] Subsections 97(3) and (4) of Act 91 were inserted by s 9 of the Courts of Judicature (Amendment) Act 1998 (Act A1031). Before the amendment, s 97 only contained sub-ss (1) and (2).

[18] We looked at other Commonwealth jurisdictions to see whether they have a similar provision. In Singapore, O 56 r 3 of its Rules of Court provides an application for leave to appeal shall be made to the High Court where the contested judgment was delivered. Order 57 r 2A of the same states that if the High Court refuses to grant the application for leave, then an application for leave to appeal shall be made to the Court of Appeal. The Court of Appeal is the apex court in Singapore. Subsections 30(1) of the Singapore Supreme Court of Judicature Act 1969 ('the SCJA') provides that the civil and criminal jurisdiction of the Court of Appeal shall be exercised by three or any greater uneven number of Judges of Appeal.

[19] However, para 3(C) of the Sixth Schedule to the SCJA provides that despite s 30(1), the Court of Appeal in the exercise of its civil jurisdiction is duly constituted for the purpose of hearing the application for leave if it consists of two Judges of Appeal.

[20] In United Kingdom, s 54 of the Senior Courts Act 1981 provides that the application for leave to appeal to the Supreme Court must be made to the Court of Appeal where the contested judgment was delivered. If the Court of Appeal refused such application, then such application may be made to the Supreme Court. The appeal panel which decides an application for permission to appeal consists of at least three judges and such applications are generally decided on paper without a hearing. This is provided for by the Supreme Court Practice Directions 3. Under s 42(1) of its Constitutional Reform Act 2005, the Supreme Court is duly constituted if the court consists of uneven number of judges of at least three judges and more than half of these judges are permanent judges.

[21] In Australia, the High Court is their apex court. Section 19 of its Judiciary Act 1907 ('the JA') states that the full court is constituted by any two or more justices of the High Court sitting together. Its s 21 provides that application for special leave to appeal shall be made to the High Court and may be heard and determined by a single Justice or by a full court and subject to condition prescribed by the High Court Rules 2004 ('the HCR'), without an oral hearing. Part 41.08.1 of the HCR provides that any two Justices may determine an application without listing it for hearing and direct the registrar to draw up, sign and seal an order determining the application.

[22] In Canada, under s 37 of its Supreme Court Act (RSC, 1985, C.S-26), the application for leave to appeal to the Supreme Court must be made to the Provincial Court/Federal Court of Appeal where the contested judgment was delivered. Its s 40 provides that the application for leave to appeal to the Supreme Court can be made to the Supreme Court, whether the application made to the Provincial Court/Federal Court of Appeal is refused, it the requisite criteria are satisfied. Section 25 provide the quorum of the Supreme Court is five.

[23] However, for leave application in civil matters, its s 43 provides a quorum of three judges; whether or not an oral hearing is ordered.

[24] In India, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies that the case involves a substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the Supreme Court. This is found in s 109 of the Indian Code of Civil Procedure 1908. So, the High Court will make a determination whether the matter is appealable.

[25] We observed from those provisions of foreign jurisdictions as explained above, there is no similar provision as in s 97 of Act 91. Section 91 is therefore peculiar to our jurisdiction. In Australia, although leave to appeal can be determined by a single judge or a full court, but once the order has been made granting leave, no appeal lies from the order. See *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 4)* (1998) 155 ALR 328.

[26] Learned counsel for the applicants had quoted the *Hansard* dated 12 May 1998 which recorded what was stated by the Minister during the second reading of the amending bill:

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> (v) Pindaan kepada Seksyen 97 adalah bertujuan untuk membolehkan permohonan bagi kebenaran untuk merayu kepada Mahkamah Persekutuan dibuat

kepada seorang hakim sahaja. Buat masa ini permohonan perlu didengar oleh panel tiga orang hakim Mahkamah Persekutuan. Bagaimanapun pihak yang tidak puas hati dengan keputusan seorang hakim itu boleh memohon untuk ke panel penuh tiga orang hakim.

[27] The above quote is found at p 31 of the *Hansard*. However, we noted at p 30 of the same, the Minister also stated that the purpose of the amendment is 'untuk mempercepatkan proses pendengaran kes-kes di Mahkamah atasan khususnya Mahkamah Persekutuan' (to expediate the process of hearing of cases at the apex court). In our considered view, that was the intention of the Legislature when amending s 97 of Act 91.

[28] We found there was nothing wrong to refer to the *Hansard* to ascertain what the intention of Parliament when enacting the law; especially when the statement reported in the *Hansard* was made by a Minister. See the decision of this court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

[29] Learned counsel for the appellants had referred to the decision of this court in *Gurubachan Singh*. In that case it was brought to this court's attention in the affidavit in support of the application as well as the submission of the applicants' counsel, of two conflicting decisions of the Court of Appeal on the same issue. From the CMS recording, it was recorded that was the reason why the application was allowed. In other words, the applicants had forwarded his grounds of application and this court allowed the application as this court was satisfied with the ground submitted by the applicants in that case.

[30] In this application before us, we found the affidavit in support of encl (47), ie encl (48), merely contains eight paragraphs, from which the relevant paragraphs are reproduced below:

5. On 22.7.2021, a single judge of this Honourable Court acting under section 97(3) of the Courts of Judicature Act 1964 dismissed the Applicants' aforesaid motion for leave with an ordered cost of RM40,000.00 subject to the drawing of allocator.

6. The Applicants abovenamed respectfully moves this Honourable Court under section 97(4) of the Courts of Judicature Act 1964 to discharge the said order and grant the Applicants' leave to appeal on the questions of law formulated and attached to the motion filed herein.

7. A copy of the Writ dated 29.7.2021, Ex parte Anton Piller Order dated 5.8.2021 and Ad Interim Order dated 25.8.2021 is reproduced and shown to me and marked as *Exhibit A-31*, *Exhibit A-32* and *Exhibit A-33* respectively.

8. Wherefore, I humbly pray for the order in terms for the motion filed herein.

[31] There was nothing in the affidavit in support to show why the application was filed other than the fact that the leave application filed earlier

had been dismissed by the single judge hearing it. No reasons were given as to what was wrong with the decision of the learned single judge. The applicant treated the application under sub-s 97(4) as a matter of right. To the applicants, once an application for leave to appeal is dismissed by a single judge, the aggrieved party can straight away within ten days file another application for it to be heard by a panel of three judges without giving reason and the panel must hear and determine the application without looking at its merit.

[32] We did not think that was the right approach. Such an approach in our view, will open the floodgates and this court will be inundated with a host of such applications. This will merely defeat the purpose of amending the said s 97, ie to expediate (*mempercepatkan*) the hearing of such application.

[33] The key point here is therefore whether this application needs justification. We agree that there was so far no direct decision of this court on sub-ss 97(3) and (4) of Act 91. However, the special panel of this court in the *Terengganu Forest* which was established to resolve the issue concerning the proper interpretation to be given to s 96 of Act 91, on application for leave to appeal to the Federal Court; had also dealt with the issue of review of decision of a single judge by a panel of three judges. This court had referred to the English case, *The Iran Nabuvat*. We reproduce the relevant paragraphs thus:

> [35] It has also been the gravamen of many an appellant that once leave is granted the panel hearing the appeal should not set aside that leave. Let us view the practice by other commonwealth countries on whether the appellate court, once leave is given, can or would rescind that leave. Cases seem to show that when the facts of the case or all relevant and material facts are not disclosed candidly, concisely and comprehensively, particularly when leave was granted ex parte, such appellate court is not prevented from rescinding that leave. See *Toronto Railway-Company v Corporation of the City of Toronto* where facts are nor correctly brought to the notice of the appellate court to which leave was sought but the appeal was from the Board of Railway Commissioners for Canada and not from a court in the true sense. See also *Mossoorie Bank Ltd v Albert Charles Raynor*.
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> [36] In some circumstances appeal to the Court of Appeal in England also require leave. In *The Iran Nabuvat* a full court of three members panel of Court of Appeal was asked to review leave to appeal granted by a single judge viz Bingham LJ.
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> Lord Donaldson of Lymington MR had this to say:
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> > It is the power to ask for a consideration inter partes in open court which has been exercised by the defendants in this case. They seek a reconsideration of the leave to appeal which was granted by Bingham LJ on a consideration of the written application of the plaintiffs for leave to appeal, and in the light of the documents which accompanied that written application.
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> > ... The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to be exercised by the court. This bias must always be towards allowing the Full Court to consider the complaints of the dissatisfied litigant,

and the justification for leave to appeal in its present form or (if as I hope will come to pass) in an extended form must be that it is unfair to the respondent that he should be required to defend the decision below, unfair to other litigants because the time of the Court of Appeal is being spent listening to an appeal which should not be before it and thereby causing delay to other litigants, and unfair to the appellant himself who needs to be saved from his own folly in seeking to appeal the unappealable.

The test of counsel for the defendants would really involve the single Lord Justice or, as is likely to be the case when there are changes in legislation, two Lords Justices hearing the application and deciding, if not whether the appeal should succeed, at least, as counsel would have us say, whether there was a probability and a reasonable likelihood of the appeal succeeding. This comes very near to actually hearing the appeal.

For my part, I have no doubt at all that no one should be turned away from the Court of Appeal if he has an arguable case by way of appeal.

That leads one on to the question of whether there is an arguable case in these particular circumstances. Again for my part, if a Lord Justice of Appeal, having studied the matter on paper, is satisfied that there is an arguable case and grants leave. *I think it would require some very cogent reasons for disagreeing with his decision*, and it certainly would not be a reason that the court which was asked to reconsider his decision did not itself think that the matter was arguable.

It is certainly within my experience, and I do not doubt within the experience of every member of the Court of Appeal, that having preread an appeal, one member of the court will say, 'I really think this is unarguable', and other members of the court will say, 'I do not know, I really think there is a point here which needs looking at seriously.' In the end, you may get a dissenting judgment or it may be that they will all come to the conclusion that the appeal is arguable or even that it should succeed.

But the point that I am making is that, if one Lord Justice thinks that an appeal is arguable, it is really necessary, *in my view, for anybody seeking a reconsideration of that to be able to point fairly unerringly to a factor which was not drawn to the Lord Justice's attention, because, perhaps, it did not feature in the documents which has been studied, or to the fact that he has overlooked some statutory provision which is decisive, or some authority which is decisive, in the sense that the appeal will inevitably fail. That is really what leave to appeal is directed at, screening out appeals which will inevitably fail.*

[37] If that is the test of reviewing the decision of a single judge deciding the question on paper of whether leave should be granted, what more when leave is granted by a panel of three judges as is the practice of our Federal Court. *According to The Iran Nabuvat's decision in order for any leave granted to be reconsidered, it has to be shown that certain facts or documents had not been studied by the judge granting leave or if that judge had overlooked some statutory provision or authority which is decisive based on which the appeal would inevitably fail if such appeal had been heard*. This principle is similar to that based in the other cases earlier cited by me.

> [38] It is to be noted that none of these cases touch on the merits of the case. They were all based on reasons that the applicants had not been honest and sincere in disclosing the facts of their cases. To me this principle is correct because the court can always set aside any order obtained by misrepresentation or fraud. (Emphasis added.)

[34] It has to be noted that in *The Iran Nabuvat*, leave to appeal was heard by a single judge based on sub-s 54(6) of the English Supreme Court Act 1981, which section had been repealed in 1999. See *37 Halsbury's Laws* (4th Ed) paras 683 and 695. Presently, as alluded to earlier, an application for leave to appeal in the United Kingdom is considered by a panel of at least three judges, decided on paper, without a hearing.

[35] As submitted by learned counsel for the respondents and we agreed, *The Iran Nabuvat*, established a stringent test for overturning an order made by a single judge on an application for leave to appeal. Unless there are very strong, cogent and compelling reasons to do so, an order made by a single judge should not be overturned.

[36] *The Iran Nabuvat*, had been adopted and approved by this court in the *Terengganu Forest*. To apply what the Honourable Zaki Tun Azmi Chief Justice had stated in para 37 of that case into this case, the applicants therefore need to show that 'certain facts or documents had not been studied by the judge granting leave or that the judge had overlooked some statutory provision or authority which is decisive based on which the appeal would inevitably fail if such appeal has been heard' or if there is misrepresentation or fraud on the part of a party which has influenced the judge's decision. But those reasons are not exhaustive. There can be some other cogent reasons which, in our view, the applicants must justify to the court.

[37] The learned single judge of this court who heard this leave application and made the impugned order had given Her Ladyship broad grounds which were recorded in the CMS minutes dated 22 July 2021, thus:

> I thank parties for parties' able submission. This is my decision, for proposed leave questions No 1 & 2 my view is that they are facts-sensitive to the matter which is between the parties and left to the discretion of judge hearing the application of the AP order ie the Anton Pilar order.
>
> This ties in with question 3, 6, 7, 8 & 12. On the proposed question 5, it talks about privileged self-incrimination, the proposed question does not reflect the facts of the case.
>
> On proposed question 9, the answer to the question is obvious that there is a presumption that the order is void. However, this does not meet the threshold to be brought up to the Federal Court.

Proposed question 10 is also fact sensitive, it seeks to limit the power of the High Court in the matter which is specified in the question.

Question 11 & 13 fall under the same category.

Question 13 should be subjected to the discretion of the judge, premised on the facts that is before him. This question attempts to limit the scope of the discretion of the judge hearing the application of the AP order. So is question 14.

Question 15 is framed on terms which are vague although it made references to the Legal Profession Act Sec 77 & 57(b) and Legal Practices. There is no identification of which aspect of such practise to enable the court to make a proper assessment of the complaint. Based on the aforesaid, the proposed questions fail to fall within the ambit of Section 96(a) of CJA and the threshold requirements of the said section of the Act and the principles of Terengganu Forest.

Therefore, the motion in Enclosure 1 is dismissed with costs of RM40,000.00 to be paid to Respondents subject to allocator fee.

[38] From the reasons given by Her Ladyship, it was obvious to us that Her Ladyship had thoroughly studied and deliberated all the issues before her. So, what was wrong with that decision? How did the learned single judge err in her decision? The applicants did not explain.

[39] Section 74 of Act 91 which provides for a minimum panel of three judges, is a general provision which has to be read subject to other provisions of the Act. With the amendment in 1998 to s 97 of Act 91, s 74 has to be read subject to sub-s 97(3) of Act 91 which allows an application for leave to appeal to the Federal Court to be heard by a single judge. Subsection 97(4) provides for any aggrieved party to that decisions under sub-s 97(3) to apply within ten days of the decision to affirm, vary or discharge the said order before a panel of minimum three judges. Hence, we had no doubt that the applicants here had the right to apply accordingly under sub-s 97(4) of Act 91.

[40] However, we are also of the view that in order for any order under sub-s 97(3) to be reconsidered before a minimum panel of three judges, cogent reasons must be given by the applicants as explained by the case of *Terengganu Forest*; as per paras 35–38 of the case. The subject matter of *Terengganu Forest* was s 96 of Act 91 which was amended at the same time as s 97. Even though sub-ss 97(3) and (4) are not mentioned in *Terengganu Forest*, the rationale of reconsidering the decision of a single judge under sub-s 97(4) is clearly stated in these paragraphs. To our mind, to say otherwise, will defeat the intent and purpose of inserting the sub-ss 97(3) and (4) of Act 91. The amendment was intended to have the result to expediate the disposal of leave applications which would entail saving judicial costs and times. To allow leave to be granted automatically upon the discharge of the dismissal order would definitely delay and hamper the proper administration of justice.

[41] To emphasise this point, we reproduce the explanatory statement of cl 9 of the Bill to amend sub-s 97 of Act 91, thus:

> 7. Clause 9 seeks to amend section 97 of Act 91 by inserting a new subsection (3).
>
> An application for leave to appeal from the Court of Appeal to the Federal Court is currently heard by a panel of three Judges of the Federal Court. *This is a waste of the court's time*. An application for leave to appeal is considered to be interlocutory matter. If an application for leave to appeal can be heard by a single Judge, three such applications can be heard by three Judges sitting separately but simultaneously and thus *expediate the disposal of those applications*. Those unhappy with an order made by a Judge can apply to be heard by the full panel of three Judges. (Emphasis added.)

[42] We must reiterate, there was no cogent reasons given by the appellant, in the Motion and its affidavit in support. We are of the opinion that an application under sub-s 97(4) cannot be made arbitrarily. The burden is on the applicants to show cogent reasons or that the single judge had committed fundamental error in her decision. We therefore, answered the issue raised in the affirmative.

[43] We would also like to add, that an application under sub-s 97(4) of Act 91 is actually a review application. The decision made by a single judge is still the decision of this court. Under no circumstances will this court review its own decision unless it can be shown that it falls within the limited ground and very exceptional circumstances as explained by this court in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1.

CONCLUSION

[44] Premised on the abovementioned, we allowed the preliminary objections raised by the respondents. Consequently, encl (47) is dismissed in limine with costs of RM40,000 subject to allocator. My learned sisters Hasnah Mohammed Hashim FCJ and Rhodzariah Bujang have read this judgment in draft and concur with the reasons given and the conclusions reached.

Preliminary objections allowed and the notice of motion dismissed.

Reported by Ashok Kumar